Supreme Court, U.S.

NO. 99 78 JUL 8 - 1999

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

FISHING VESSEL OWNERS & MARINE WAYS, INC.,

Petitioners,

vs.

BANK OF AMERICA, NT & SA, formerly Seattle-First National Bank, fdba Seattle First National Bank aka Seafirst Bank, PENGWIN, Official No. 586183, KONRAD S. URI & I. HELEN URI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX TO PETITION

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APPENDIX

A. OPINIONS, ORDERS, FINDINGS OF FACT AND CONCLUSIONS OF LAW

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BANK OF AMERICA, NT&SA,
formerly Seattle-First National
Bank, fdba Seattle First National
Bank, aka Seafirst Bank,
Plaintiff-Appellee,

No. 97-36050

v.

D.C. No.

PENGWIN, Official No. 586183,
CV-96-01305-JCC
Defendant,

OPINION

and

FISHING VESSEL OWNERS & MARINE
WAYS, INC.,
Intervenor-Appellant.

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
February 5, 1999--Seattle, Washington

Filed April 14, 1999

Before: Pamela Ann Rymer and Andrew J. Kleinfeld, Circuit Judges, and Jeffrey T. Miller,* District Judge.

Opinion by Judge Rymer

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*Honorable Jeffrey T. Miller, United States District Court Judge for the
Southern District of California, sitting by designation.

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SUMMARY

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COUNSEL

Gregory J. Lawless, The Lawless Partnership, Seattle, Washington, for the intervenor-appellant.

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John E. Casperson (argued) and Christopher Y. Kim, Holmes Weddle & Barcott, Seattle, Washington, for the plaintiff-appellee.

OPINION

RYMER, Circuit Judge:

In this appeal we are asked to resolve the priority of various maritime liens against the vessel PENGWIN. Seattle-First National Bank ("Bank")1 caused the vessel to be arrested, and the PENGWIN, together with its fishing rights, were sold at a marshal's auction May 7, 1997. Fishing Vessel Owners & Marine Ways, Inc. ("FVO") intervened. The district court confirmed the sale and determined that the Bank, which had recorded two preferred ship mortgages before FVO had completed work on the vessel that gave rise to a necessaries lien, as well as a series of mortgages thereafter, had priority to the extent of the outstanding balance on the indebtedness secured by both of the earlier mortgages as of the time FVO's lien arose. The main issues presented by FVO's appeal are whether the two earlier mortgages should have been consolidated and treated as replaced and renewed, and whether partial priority should have been accorded the outstanding balance on those mortgages in the face of subsequent mort- gages that substantially exceeded the amount of the prior indebtedness. We conclude that the mortgages recorded before the necessaries lien arose were not extinguished and therefore take priority at least to the extent that they remained unpaid when FVO's lien was perfected. As the district court did not otherwise err, we affirm.

1 Seattle-First National Bank (dba SeaFirst Bank) is now Bank of America, NT&SA.

I

The transactions relevant to our decision are as follows:

- June 23, 1988: The Bank recorded a mortgage on the PENGWIN securing a promissory note for $735,000 with interest at 1.75 over prime and semi-annual principal payments of $46,000 until November 1, 1996, when the unpaid balance was due and payable.

- September 20, 1990: The Bank recorded a mortgage on the PENGWIN securing a promissory note for $300,000 with interest at 1.75 over prime and semi-annual payments of principal of $30,000 until June 30, 1995, when the unpaid balance was due and payable. The "Prior and Subsequent Liens Affidavit" notes a first PMM in favor of the Bank for $735,000.

- June 26, 1991: FVO completed work on the PENGWIN, giving rise to a $148,208.85 necessaries lien.

- July 10, 1991: The Bank recorded a mortgage on the PENGWIN securing a promissory note for $1,400,000 with interest at 1.675 over prime and

semi-annual payments of principal of $87,500 until July 1, 1999, when the unpaid balance was due and payable. The "Prior and Subsequent Liens Affidavit" notes a first PMM in favor of the Bank for $735,000 and a second PMM for $300,000.

- December 30, 1991: The Bank recorded a mortgage on the PENGWIN securing a promissory note for $1,900,000. The "Prior and Subsequent Liens Affidavit" notes no prior mortgages.

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- December 22, 1994: The Bank recorded a mortgage on the PENGWIN securing the debt of Isafjord Fishing Company for $1,150,000. Its "Prior and Subsequent Liens Affidavit" notes a first PMM in favor of the Bank.

- December 30, 1994: The Bank recorded an"Amendment to Preferred Mortgage" of December 30, 1991, changing the amount to $1,733,750 and securing a new promissory note. The "Prior and Subsequent Liens Affidavit" notes no prior mortgages.

- May 7, 1997: The PENGWIN was sold by the Marshal to the Bank for $575,000.

Meanwhile, on August 21, 1996, the Bank filed a complaint seeking to foreclose on the December 30, 1991 mortgage (for $1,900,000.00, with a balance of $1,741,607.27) and the December 22, 1994 mortgage (for $1,150,000 with a balance of $1,080,339.97). The First Amended Complaint alleges that

the December 1991 mortgage was a renewal of and replacement for the promissory notes secured by the July 1991 mortgage (for $1,400,000), which in turn was a renewal and replacement of the June 1988 mortgage for $735,000 and the September 1990 mortgage for $300,000. FVO intervened to assert a maritime lien for necessaries in the amount of $148,208.85. The district court entered an order directing the United States Marshal to conduct a sale of the PENGWIN and its fishing rights to satisfy lien claims. Notice of the sale was published for six days prior to the sale as required by Local Admiralty Rule 145(a). FVO objected to confirmation because the notice did not correctly identify the vessel's location or indicate that fishing rights were included, and because the sale resulted in an inadequate price. The district court confirmed the sale on May 29, 1997.

The Bank then moved for summary judgment to establish the priority of its claim over FVO, which the district court

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granted. The court acknowledged the general rule that in the absence of a clear indication of contrary intent, execution of a new mortgage in renewal of a former one does not extinguish priority of the former one, and that as long as a portion of the principal debt remains, the new mortgage is presumed to be a renewal regarding the same security. See Southern Reef Fisheries v. O/S Broadfire Leader, 786 F.2d 1523, 1524 (11th Cir. 1986). The court also recognized that this rule (sometimes referred to as the "mortgage renewal " rule) only applies to the extent of the amount of the remaining debt at the time of renewal. See Merchants & Marine Bank v. The Fishing Vessel T.E. Welles, 289 F.2d 188, 194 (5th Cir.

1961). Given the Bank's evidence that the lien balances on the June 1988 and September 1990 mortgages were never less than $745,144.77 in total, and that this remaining $745,144.77 lien had never been extinguished, the court rejected FVO's argument that the July 1991 mortgage was new and destroyed the Bank's priority on the June 1988 and September 1990 mortgages. The court also rejected FVO's contention that the June 1988 and September 1990 liens were separate mortgages and the remainder on each was less than the amount of the vessel proceeds, as FVO provided no evidence that separating the liens would affect their total value. Finally, the court concluded that FVO would not be left in a worse position under the mortgage renewal rule because the amount of the Bank's lien in June 1991, when FVO perfected its lien, exceeded the total of the sale proceeds.

After the Bank's motion for summary judgment was noticed, FVO moved to compel discovery and argued that summary judgment should be denied until discovery was completed. The district court found the circumstances did not come within Rule 56(f) given the time that had elapsed since FVO first raised the issues that were covered by the discovery request.

FVO has timely appealed each of these rulings.

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II

[1] A mortgage that complies with the requirements of 46 U.S.C. S 31322(a)(1)--as each of the Bank's mortgages do in

this case--is a "preferred" mortgage that has priority over all claims against a vessel except for expenses allowed by the court and preferred maritime liens. See 46 U.S.C. S 31326(b)(1). Preferred maritime liens are those arising before a preferred mortgage is filed, or for tort damages, wages, general average, and salvage. See 46 U.S.C. S 31301(5). FVO's lien arose on account of labor, parts and materials and so is not a preferred maritime lien with respect to the Bank's July 1988 and September 1990 preferred ship mortgages. As a result, those mortgages have priority over FVO's lien, unless they were extinguished.

The Bank foreclosed on the theory that the December 1991 mortgage renewed and replaced the July 1991 mortgage, which in turn had renewed and replaced the September 1990 and July 1998 mortgages that were prior to FVO's lien. Its position is that the unpaid balance on the September 1990 and July 1998 mortgages--$745,144.77--carried forward with each renewal. As that debt was never paid, the Bank claims the same priority for that amount as it had at the time FVO's lien arose.

FVO contends that the series of mortgages recorded after its lien was perfected did not renew the June 1988 or September 1990 mortgages. The heart of its case is that the renewal rule cannot apply unless the debt is the same, and here it wasn't because the Bank increased the amount of indebtedness from $300,000 to $2,800,000.2 FVO argues that allowing

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2 FVO's argument refers at different times to different mortgages and to different numbers. For example, sometimes it compares the $2.8 million of aggregate mortgages existing as of December 1994 with the September 1990 mortgage for

$300,000. Its position in the district court was that the September 1990 mortgage, being closest in time to its necessaries lien, is

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the Bank to retain the priority status of the old preferred ship mortgages, even to the amount of the outstanding balance, puts FVO in a worse position since the additional debt permits the Bank to leapfrog over the payments which would otherwise have been used to retire the original debt.

The "mortgage renewal rule," which neither the Bank nor FVO challenges except in application, is well established in the Fifth and Eleventh Circuits, but has not previously been addressed in the Ninth Circuit.3 As first articulated in The T.E. Welles,

> [t]he accepted rule is that unless a contrary intention of the parties clearly appears, the execution and delivery of a new mortgage in renewal of a former one, even though accompanied by a formal satisfaction and discharge of the initial mortgage, does not have the effect of extinguishing the priority which the initial mortgage carries. The subsequent mortgage given in renewal is prior to liens which arose or would otherwise have come into being during the period of the initial mortgage.

The T.E. Welles, 289 F.2d at 194.4 In The T.E. Welles, a pre-

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the operative "prior" preferred ship mortgage, an argument

that it repeats here. As we shall explain, we disagree that only that lien counts. At other times, FVO uses the July 1991 mortgage securing a $1.4 million note for comparison purposes. FVO also relies on the original principal balance of the June 1988 note of $735,000, and sometimes on $459,000, which would have been the remaining principal balance as of July 1991 on the June 1988 note if it had been paid down in accordance with its terms. 3 We recognized a similar rule in The Bergen, 64 F.2d 877, 880-81 (9th Cir. 1933), upon which The T.E. Welles relied in part, that a discharge by the mortgagee of his lien and the surrender of it to the mortgagor in consideration of a conveyance of the mortgagor's interests to the mortgagee does not extinguish the lien as against junior or intermediate encumbrances, but rather, the senior lien still retains its priority. 4 Although not frequently discussed in reported cases, the rule has been recognized and applied by a number of courts. See, e.g., Soūthern Reef

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ferred ship mortgage was recorded to secure a note for $12,000; when its balance was $7,771.50, the Bank agreed to loan an additional $4,000 for which the vessel owners executed a new note for $11,500. A new preferred ship mortgage for that amount was executed, and a satisfaction of the initial mortgage was filed along with the new mortgage. As the court observed, the security and the parties were the same, and the debt was substantially the same. Meanwhile, a lien for supplies had arisen. In those circumstances, the court held that "where the holder of a senior mortgage discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien

unless the circumstances of the transaction indicate this to have been his intention." Id. at 194 (internal quotations omitted).

The Fifth Circuit revisited the renewal rule in Barnouw v. The S.S. Ozark, 304 F.2d 717 (5th Cir. 1962), and Avondale Shipyards, Inc. v. Tank Barge ETS 2303, 754 F.2d 1300 (5th Cir. 1985). In Barnouw, a balance of $360,000 on an earlier debt of $500,000 secured by a ship mortgage was refinanced to $410,000, secured by a new preferred mortgage which did not refer to the former mortgage, on which a satisfaction was recorded. The court noted that at the time of the rearrangement, the debt was $360,000 and to this extent, there was no advance of new credit or cash. Further,

[w]hatever the consequence of the increase in the debt, or the change in the interest rate, it is uncontra-

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Fisheries, 786 F.2d at 1524; Avondale Shipyards, Inc. v. Tank Barge ETS 2303, 754 F.2d 1300, 1305-10 (5th Cir. 1985); Barnouw v. The S.S. Ozark, 304 F.2d 717, 722 (5th Cir. 1962); C.I.T. Corp. v. M/V Winchester, 643 F.Supp. 1059, 1062-64 (E.D. Va. 1986); Southwest Wash. Prod. Credit Ass'n v. O/S New San Joseph, 1977 AMC 1123, 1125-26 (N.D. Cal. 1977); Coastal Dry Dock & Repair Corp. v. The S.S. Baybelle, 1975 AMC 1736, 1754-55 (S.D.N.Y. 1975); Marine Mart, Inc. v. The O/S Miss Darla Dawn, 273 F.Supp. 353, 357 (S.D. Tex. 1967).

dicted that for an amount way in excess of the

> proceeds from the Marshal's sale of the vessel, the former debt continued unpaid. This brings into play the proposition that "so long as the same debt, or some part of it, subsists, the presumption ordinarily is that the new mortgage is intended as a renewal of the old, and the continuance of the same security."

Barnouw, 304 F.2d at 723 (citations omitted). The result was that the later mortgage carried with it the former mortgages to the extent of the original debt remaining at the time of the implied renewal.

[2] In Avondale Shipyards, the issue was whether the parties had to be identical in order to grant a renewal mortgage the priority of a discharged mortgage for which it had been substituted. The court concluded that a change in mortgagors did not necessarily preclude application of the mortgage renewal rule, but in so holding, it had occasion to survey the authorities and to discuss the rule in some detail. As it explained:

> [T]he rule is an equitable one designed to accommodate two basic security principles. The first principle is that, when one acquires a lien on property already encumbered by a mortgage, he does so subject to the possibility, because of rearrangements or renewals of the indebtedness, that the lien of the mortgage may be extended beyond the original maturity date or that the terms of the indebtedness may otherwise change. In other words, indebtedness may be extended, renewed, or rearranged without necessarily releasing the lien of a mortgage by which it is secured. The second principle is that a recorded

> satisfaction or dis charge generally releases a mortgage lien. This usually takes place, of course, in connection with payment of the underlying indebtedness. The renewal mortgage rule operates when the parties
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> intend to avail themselves of the first principle but, at the same time, take action which invokes the second principle. When parties who intend simply to renew or rearrange a debt that has not actually been paid release an existing mortgage and, at the same time, record a new mortgage by which they intend to extend the lien of the prior mortgage, they should be granted relief from the consequences that normally flow from the release or satisfaction of a mortgage if intervening liens and claims are left in no worse a position than they would have occupied if the parties had properly structured the renewal or rearrangement of the debt. Thus, the rule provides equitable relief from the mistake of recording a satisfaction or dis charge of a mortgage to parties who did not intend to release the lien.

Avondale Shipyards, 754 F.2d at 1308 (citations omitted).

FVO maintains that the district court improperly extended this rule in two respects: by holding that the Bank could consolidate the 1988 mortgage and the 1990 mortgage and then relate back the priority to 1988, and by ruling that since the Bank bid only $575,000 at the time of the sale, and the consolidated amount of the loans in existence at the time of

the FVO lien exceeded that amount, the amount was a renewal.

[3] We do not agree with FVO that the court pushed the envelope of the renewal rule in these respects. Indeed, the renewal rule is not implicated at all with respect to the "consolidation" of the June 1988 and September 1990 mortgages. Both were on the books and reflected on the abstract of title when FVO undertook its work on the vessel. It does not make any difference whether they are given priority from 1988 or 1990, as in either case both mortgages were recorded before FVO's lien was perfected.

[4] Nor do we believe FVO's contention that the district court, relying on the renewal doctrine, improperly invented

3418 "partial priority" of a mortgage. Rather, the court granted the Bank priority only to the extent of the balance of the $745,144.77 outstanding when FVO perfected its lien, and found that this did not leave FVO in a worse position since this amount exceeded total sale proceeds. The district court's ruling fully comports with the decisions in Barnouw and The T.E. Welles, which granted priority to the mortgagee "only to the extent of the original debt remaining at the time of the subsequent renewal." Barnouw, 304 F.2d at 722 n.5. As the court in Barnouw reasoned, to this extent, a renewal mortgage extends no new credit at all.

FVO also argues that whether one looks at the original principal balance of the September 1988 note, the remaining principal balance on that note as of July 1991, or the $300,000 note and mortgage, neither the July 1991 mortgage for $1,400,000 nor the 1994 mortgages on the PENGWIN and

the ISAFJORD for $2,800,000 can be a renewal mortgage because neither is "substantially the same" as the original debt. FVO also suggests that it is improbable that the $735,000 note was "renewed" by a $300,000 note that, in turn, was "renewed" by a $1,400,000 note, and later by notes totaling $2,800,000. Furthermore, it contends that if a mortgagee is allowed to consolidate separate mortgages and to secure debt greater than the original mortgage, intervening lien claimants such as itself will be prejudiced because debt service obligations are different with a larger loan, the likelihood of foreclosure is increased, and the prior debt may not be paid down (or payments credited) in the same way as it was before the restructuring. Therefore, FVO submits, since "[r]elief [pursuant to the mortgage renewal rule] will be denied if an intervening party relied on the satisfaction or if recognition of the priority of the renewal mortgage will place the intervening party in a position inferior (e.g., because the renewal mortgage secures a sum greater than the original mortgage) to that which he would have occupied if the mortgage had not been renewed," Avondale Shipyards, 754 F.2d

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at 1310, we should not allow the Bank's new mortgages to relate back to earlier mortgages.

[5] While these points have force and might well lead to a different result in a different case, we do not see how they can make any difference in this case since the outstanding principal amount of the June 1988 and September 1990 mortgages substantially exceeded the proceeds from the sale of the vessel.5 Whatever the import of increasing the debt or changing the payout, the fact remains that the old debt was still unpaid and, like the lien claimants in Southern Reef

Fisheries, 786 F.2d at 1525, Barnouw, 304 F.2d at 723, and CIT Corp. v. M/V Winchester, 643 F.Supp. 1059, 1064 (E.D. Va. 1986), FVO would not have had priority in these proceeds in any event.

[6] The Bank's evidence shows that it was owed $745,144.77 on June 19, 1991, representing the balance remaining on the notes secured by the June 1988 and September 1990 mortgages. It also shows that the new debt of $1.4 million secured by the July 10, 1991 mortgage was a renewal of the old debt and a further extension of credit to the PENGWIN. FVO did not controvert this evidence, except to say that the Liens Affidavit for the July 1991 mortgage executed by the PENGWIN's owner mentions the 1988 and 1990 mortgages, whereas later mortgages do not. However, these documents are insufficient to overcome the presumption that the new mortgage was intended as a renewal of the old mortgages, and the continuance of the same security. To the contrary, the presumption in this case is strengthened because the June 1988 and September 1990 mortgages were never discharged, nor was the lien on the unpaid balance ever extin-

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5 While FVO argues that the outstanding balance should not have been as high, and that it would have been zeroed out by the time of foreclosure if the June 1988 and September 1990 notes had been paid down in accordance with their terms, and if post-July 1991 payments had been credited to pre-July 1991 debt, it adduced no evidence raising a triable issue about the Bank's calculation of the outstanding balance, nor did it request additional discovery to pursue this point.

guished. Even if FVO were correct that the renewal rule should not apply, the 1988 and 1990 mortgages would still be outstanding and the debt would still be unpaid. Either way, its position would be precisely the same. Since other courts preserve the priority of an earlier mortgage even when a formal satisfaction has been filed for the initial mortgage, a fortiori priority should be presumptively preserved to the extent of the outstanding balance when the earlier mortgage has not been discharged.

[7] Nor are we persuaded otherwise by FVO's argument that the increase in debt from $735,000 to $2,800,000 strongly suggests that there was insufficient equity and capital to cover the obligations imposed on the vessel, thereby tilting the paramount equities in its favor. There simply is nothing in the record compelling such a conclusion. FVO's further contention that the loan immediately prior to its lien was for only $300,000, and thus the court should not have granted priority on the ground that the amount of the Bank's bid at the sale was less than the amount owed at the time FVO's lien was in place, fails as well. Both the June 1988 mortgage for $735,000 and the September 20, 1990 mortgage for $300,000 were in existence prior to the FVO lien, as FVO well knew from the vessel's abstract, and neither was extinguished. In addition, FVO suggests that no amount in excess of $300,000 could be a renewal because the September 1990 note on its face indicates that the borrower is not entitled to further advances once the total amount of principal has been advanced. However, the September 1990 loan was a straight line of credit, and the limitation was for further advances on that line of credit. Nothing in that note controverts the Bank's intent to renew, or prevents the Bank from restructuring or rearranging outstanding debt, or from extending further debt in a different

form.

[8] Finally, FVO argues that the district court's ruling consolidating all loans will adversely affect the fishing industry. First, it states that while in the normal course of business, if

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a shipyard determines from a vessel abstract that the amount of indebtedness is less than the equity in the vessel, it will deem the vessel credit worthy, under the district court's doctrine of consolidation of all loans, it will be difficult for a shipyard to know whether or not to extend credit because it will be unable to tell how much is outstanding and what mortgage dates truly apply. However, FVO knew exactly how much credit was outstanding and on which mortgages; all that it did not know was when or how those debts would be paid or what additional credit would be extended in the future or by whom. That level of uncertainty is inherent in the system. As Avondale Shipyards points out, a lienor acquiring a lien on property already encumbered by a mortgage "does so subject to the possibility, because of rearrangements or renewals of the indebtedness, that the lien of the mortgage may be extended beyond the original maturity date or that the terms of the indebtedness may otherwise change." Avondale Shipyards, 754 F.2d at 1308. We do not see how recognizing the priority of undischarged debt to the extent of the outstanding balance at the time the necessaries lien arises affects the equation. Second, FVO submits that the notion of partial priority is impractical and also harmful to the fishing industry. This stems from its view that the district court assumed FVO could have bid at the sale and protected its equity, and that it allowed partial priority based on the amount

bid at the auction compared to the amount owed on all loans at the time of the initial lien. However, that is not what the district court did; it found that FVO's position was not hurt because, as it turned out in this case, the vessel was sold for less than the outstanding balance on the senior debt.

In sum, the Bank's June 1988 and September 1990 mortgages were not extinguished, both mortgages had an outstanding balance, the Bank was given priority only to the extent of the original debt remaining when FVO's lien arose, and the former debt continued unpaid in an amount greater than the proceeds from sale of the vessel. Under none of the scenarios asserted by FVO would its claim have been paid. In light of

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these circumstances, to hold that the unpaid balance did not carry forward would run counter to the tenor of the ship mortgage laws, enacted to assure security to those supplying essential financing to the shipping industry, and to common sense since a ruling in favor of FVO would imply that the Bank purposefully relinquished its preferred status from the earlier mortgages in exchange for nothing more than a junior security. For these reasons, we cannot say that the district court erred in granting priority to the senior mortgages to the extent of the balance outstanding at the time FVO's lien was perfected.

III

FVO argues that it should have been allowed to complete discovery to respond to the Bank's motion for summary judgment. Although it filed no Federal Rule of Civil Procedure

56(f) affidavit, and did not move for a continuance pursuant to Rule 56(f), FVO did indicate that discovery was incomplete in its opposition to the Bank's motion. After filing its opposition on September 5, 1997, FVO filed a motion to compel on September 11. Based on the fact that FVO knew about the issues on which further discovery was sought, and knew as early as May that the Bank was refusing to produce the documents requested and to provide discovery, the district court found that the situation did not fall within the purview of Rule 56(f). We review the district court's decision for an abuse of discretion, see Margolis v Ryan, 140 F.3d 850, 853 (9th Cir. 1998), and we will only find an abuse of discretion if the movant diligently pursued its previous discovery opportunities, and can demonstrate that allowing additional discovery would have precluded summary judgment. See Byrd v. Guess, 137 F.3d 1126, 1135 (9th Cir.), cert. denied sub nom. Byrd v. Cantu, _____ U.S. _____, 119 S. Ct. 405 (1998).

[9] The district court did not abuse its discretion here, for several reasons. In addition to FVO's delay in compelling discovery, see, e.g., Brae Transp., Inc. v. Coopers & Lybrand,

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790 F.2d 1439, 1443 (9th Cir. 1986) (finding no abuse of discretion in the district court's refusal to allow discovery before summary judgment where the movant took no discovery for four months after issue of shareholder complicity in accounting fraud had arisen), FVO failed to move for a continuance, see Beneficial Standard Life Ins. Co. v. Madariaga , 851 F.2d 271, 277 (9th Cir. 1988), and did not submit affidavits that indicated "why [it could not] then present facts essential to justify [its] opposition to summary

judgment. " Carpenter v. Universal Star Shipping, S.A., 924 F.2d 1539, 1547 (9th Cir. 1991); see also Fed. R. Civ. P. 56(f) (requiring affidavits from the party opposing the summary judgment motion). Nor did its motion to compel indicate how the information sought would preclude summary judgment. See Garrett v. City & County of San Francisco, 818 F.2d 1515, 1518-19 (9th Cir. 1987). FVO sought the production of surveys regarding the value of the vessel, agreements between the PENGWIN's owner and the Bank, and a document which purported to preclude the owner from helping other creditors establish the respective priorities of their liens or ascertain the value of the vessel. As such, the discovery FVO wished to complete had to do with valuation of the vessel, an issue already decided, not with priority, which was the subject of the summary judgment.6 As further discovery of this nature would not have affected the summary judgment ruling, the court was not obliged to allow it.

IV

[10] FVO contends that the district court erred in confirming the sale of the PENGWIN and its fishing rights because

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6 FVO states that discovery may have revealed an agreement requiring the PENGWIN's owner to assist the Bank in defeating creditor claims and surveys in the possession of the Bank demonstrating that its bid was grossly inadequate, giving rise to a claim of equitable subordination. However, FVO produced no evidence, cited no authority, and offered no explanation in support of an equitable subordination claim.

review a district court's order confirming a U.S. Marshal's sale for an abuse of discretion. See Ghezzi v. Foss Launch & Tug Co., 321 F.2d 421, 425 (9th Cir. 1963). A sale may be set aside on a showing of (1) fraud on the part of the purchaser, the officer conducting the sale, or any other person connected with the sale; (2) collusion; or (3) inadequacy of price, provided the inadequacy is gross and is such as amounts to either fraud or unfairness. See id.

As a preliminary matter, the Bank contends that we lack jurisdiction to consider this issue since FVO failed to move for a stay of execution or file a supersedeas bond before the vessel left control of the district court. However, continuous control of the res is not required in order for the district court or this court to retain jurisdiction. See Republic Nat'l Bank v. United States, 506 U.S. 80, 93 (1992) ("No settled rule requires continuous control of the res for appellate jurisdiction in an in rem forfeiture proceeding."); see also Stevedoring Servs. v. Ancora Transp., N.V., 59 F.3d 879, 882 (9th Cir. 1995) (noting that "[w]hile a district court needs jurisdiction over a res to initiate an in rem action, it does not need to maintain continuous control of the res to maintain jurisdiction of the action," and reading Republic National Bank as eliminating any requirement that a party seeking to institute a maritime attachment obtain a stay or post a supersedeas bond in order to preserve the district court's jurisdiction over garnished funds while the party appeals the release of the funds).

On the merits, FVO contends that the PENGWIN was sold for an amount significantly below its market value. Based on an October 1991 valuation, FVO claims that the PENGWIN had an estimated market value of $3,500,000, not including the value of the fishing permits, and that based on the declaration

of Kinda Kozak, a fishery consultant, the fishing rights were worth $650,000 to $900,000 in May 1997, the time of the foreclosure sale. It also points to evidence that the Bank had offered to sell the PENGWIN and another vessel for

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$3,000,000 approximately one year prior to the U.S. Marshal's sale.

[11] We are not firmly convinced of error. While there is evidence that the vessel was worth $3,500,000 in 1991, and that the Bank was willing to sell it and a second vessel for $3,000,000, the court was within its discretion to find that the auction price was adequate. Two days after the foreclosure sale, the President of FVO estimated the value of the vessel, including its fishing rights, to be $825,000. Given that the vessel was sold at foreclosure, this is not a gross disparity. See BFP v. Resolution Trust Corp., 511 U.S. 531, 537-38 (1994) (observing that the market value of a piece of property is not the price expected to be obtained in the foreclosure context). Finally, as the district court found, there was no evidence that a higher upset bid had been made or was likely to be made in the event of resale. Thus, we cannot conclude that the court erred in failing to set aside the sale.

[12] FVO also maintains that the Bank is not entitled to confirmation of its bid since the sale was unfairly conducted to the detriment of other creditors and the debtor. First, it points to the failure to give general notice that the fishing rights were being sold. However, as the district court observed, notice of inclusion of fishing rights is not required under the rules and, in any event, no evidence was adduced that the PENGWIN

would have sold for a higher price had the fishing rights been included in the notice. See Ghezzi, 321 F.2d at 425.

[13] Next, FVO argues that by giving the wrong location of the vessel and failing to mention the fishing rights, the form of the notice violated due process. Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). "It is reasonable to presume that a party with an

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interest in a vessel will keep itself apprised of events concerning that vessel." DiGiovanni v. Kjessler, 101 F.3d 76, 78 (9th Cir. 1996). As the district court found, FVO produced no evidence that either the debtor or any creditor was prejudiced by the Bank's actions, or that anyone would have made a higher bid if fishing rights had been mentioned in the notice or if the vessel's location had been correctly stated. Instead, the record shows that a good number of potential buyers were informed of the inclusion of fishing rights and actually attended the sale. While the notice misplaced the vessel's location by 100 feet, the vessel had been berthed where the sale took place for months. As a result, we cannot say that the court erred in concluding that the notice was reasonably calculated to apprise potential buyers of the pending action.

AFFIRMED.

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B. OTHER OPINIONS, ORDERS, FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

October 21, 1997
At Seattle
Clerk U.S. District Court
Western District of
Washington

BANK OF AMERICA NW, N.A., dba SEAFIRST BANK,	)	
Plaintiff,	)	CASE No. C96-1305C
v.	)	
	)	ORDER
PENGWIN, Official No. 586183, PENGWIN, INC., KONRAD S. URI and I. HELEN URI,	)	
Defendants.	)	

I. Introduction

This is an action to recover various maritime liens against the vessel PENGWIN (sic). The vessel and its fishing rights were sold at a marshal's auction on May 7, 1997 for

$575,000.[1] The Court confirmed that sale on May 29, 1997. On July 16, 1997, the Court ordered the Bank of America NT&SA (formerly Bank of America N.W., N.A. and Seattle-First National Bank), d/b/a Seafirst Bank (Bank) had established lien priority over J.M. Martinac Shipbuilding Corporation and Sullivan & Curtis Insurance Brokers of Washington, Inc. Shortly thereafter, the Court dismissed J.M. Martinac Shipbuilding Corporation and Sullivan & Curtis Insurance Brokers of Washington, Inc.

This matter is presently before the Court on the Bank's Motion for Summary Judgment. The Bank moves on the grounds that its lien has priority over FVO's lien. Neither party requested oral argument.

II. Facts

In June 1988, the Bank recorded a mortgage against the PENGWIN (sic) for $735,000. In September 1990, the Bank recorded a mortgage against the PENGWIN (sic) for $350,000. In June 1991, FVO completed work on the PENGWIN (sic), giving rise to a $148,000 lien. In July 1991, the Bank recorded a $1,400,000 mortgage against the PENGWIN (sic). After July 1991, the Bank requested a series of mortgages, ultimately recording a $2,800,000 mortgage in 1994. The series of notes from July 1991 to 1994 state that

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[1] The Court notes in its July 16, 1997, Order at page 4: "The Court cautions that its Order granting the Bank a mortgage in the fishing rights should not be viewed without careful consideration of the posture of the case. The Court reiterates that the Bank's motion was granted primarily, if not solely, due to the lack of opposition."

they are renewals and replacements of previous mortgages. The June 1988, September 1990, and June 1991 mortgages do not state whether they are renewals or not. In addition, a document entitled "Prior and Subsequent Liens Affidavit" was filed in conjunction with the July 1991 mortgage. That document listed the June 1988 and September 1990 mortgages as prior liens.

III. Discussion

Absent a clear indication of contrary intent, execution and delivery of a new mortgage in renewal of a former one does not extinguish priority of the former one. Southern Reef Fisheries v. O/S BROADFIRE LEADER, 786 F.2d 1523, 1524 (11th Cir. 1986). This rule has equal effect when the principal on the mortgage is subsequently increased. Id. at 1424-25. As long as a portion of the principal debt remains, there is a presumption that the new mortgage is a renewal, and regards the same security. Id at 1525. However, this rule only applies to the amount of the remaining debt at the time of renewal. Merchants and Marine Bank v. T.E. WELLES, 289 F.2d 188, 194 (5th Cir. 1961).

The Bank argues that in May 1991 it had a lien for $745,144.77, an amount in excess of the sale proceeds, for the remainder of the June 1988 and September 1990 mortgages. The Bank goes on to argue that the mortgages from July 1991 to 1994 were renewals, and therefore maintained the Bank's lien priority. Thus, if the July 1991 lien was a renewal then the priority was maintained; or, alternatively, if the July 1991 lien was a new mortgage, then the prior liens still exist, and have priority over FVO's lien. The Bank has submitted the declaration of James H. Michaels as evidence that the lien on

the June 1998 (sic) and September 1990 mortgages has never been less than $745,144.77.

FVO argues that the Bank must establish a trail of refinances from 1998 (sic) to 1994. FVO goes on to argue that the July 1991 mortgage was new, and therefore destroyed the Bank's priority on the June 1988 and September 1990 mortgages. However, FVO's position overlooks the prior liens. In order for FVO to gain priority over the remaining $745,144.77 of the initial lien, that lien must have been extinguished. FVO does not argue that it has been extinguished, nor does FVO provide any evidence of it. FVO also states that the June 1988 and September 1990 liens are separate mortgages and that the remainder on each of those mortgages is less than the amount of the vessel proceeds. However, assuming they are separate liens, FVO has not provided any evidence that separating the liens would affect their total value.

FVO argues that all of the cases that discuss the renewal mortgage rule note that the junior lienor was left in substantially the same position as if the mortgage had not been renewed. FVO states that in this case the debt was increased to $1,400,000 in July 1991. Consequently, FVO believes that it would be left in a worse position if the Court applied the renewal mortgage rule. However, the amount of the Bank's lien in June 1991, when FVO perfected its lien, exceeded the total of the sale proceeds. Consequently, FVO will not be left in a worse position.

Finally, FVO argues that summary judgment should be denied until FVO can complete its discovery. Fed. R. Civ. P. 56(f) requires that summary judgment be denied when it

appears that the opposing party has not been given an opportunity to discover information essential to defeat the motion. Anderson v. Liberty, Inc., 106 S. Ct. 2505, 2511 n.5 (1986). FVO has had many months to discover these issues. It first raised them in May 1997, when briefing its objections to the vessel sale. As a result, this situation does not come within Rule 56(f).

IV. Conclusion

In accordance with the foregoing analysis, summary judgment is GRANTED in favor of the Bank. Further, because there does not appear to be any issues remaining in the action, FVO's Motion to Compel Answers to Deposition Questions and Production of Documents is DENIED as moot.

SO ORDERED this 21 day of October 1997.

/s

UNITED STATES DISTRICT JUDGE

C. STATUTES, ORDINANCES AND REGULATIONS

46 U.S.C. § 31321. Filing, recording, and discharge

(a)

(1) A bill of sale, conveyance, mortgage, assignment, or related instrument, whenever made, that includes any part of a documented vessel or a vessel for which an application for documentation is filed, must be filed with the Secretary of Transportation to be valid, to the extent the vessel is involved, against any person except -

(A) the grantor, mortgagor, or assignor;

(B) the heir or devisee of the grantor, mortgagor, or assignor; and

(C) a person having actual notice of the sale, conveyance, mortgage, assignment, or related instrument.

(2) Each bill of sale, conveyance, mortgage, assignment, or related instrument that is filed in substantial compliance with this section is valid against any person from the time it is filed with the Secretary.

(3) The parties to an instrument or an application for documentation shall use diligence to ensure that the parts of the instrument or application for which they are responsible are in substantial compliance with the filing and documentation requirements.

(4) (A) A bill of sale, conveyance, mortgage, assignment, or related instrument may be filed electronically under regulations prescribed by the Secretary.

(B) A filing made electronically under subparagraph (A) shall not be effective after the 10-day period beginning on the date of the filing unless the original instrument is provided to the Secretary within that 10-day period.

(b) To be filed, a bill of sale, conveyance, mortgage, assignment, or related instrument must -

(1) identify the vessel;

(2) state the name and address of each party to the instrument;

(3) state, if a mortgage, the amount of the direct or contingent obligations (in one or more units of account as agreed to by the parties) that is or may become secured by the mortgage, excluding interest, expenses, and fees;

(4) state the interest of the grantor, mortgagor, or assignor in the vessel;

(5) state the interest sold, conveyed, mortgaged, or assigned; and

(6) be signed and acknowledged.

(c) If a bill of sale, conveyance, mortgage, assignment, or related document is filed that involves a vessel for which an application for documentation is filed, and the Secretary decides that the vessel cannot be documented by an applicant -

(1) the Secretary shall send notice of the Secretary's decision, including reasons for the decision, to each interested party to the instrument filed for recording; and

(2) 90 days after sending the notice as provided under clause (1) of this subsection, the Secretary -

(A) may terminate the filing; and

(B) may return the instrument filed without recording it under subsection (e) of this section.

(d) A person may withdraw an application for documentation of a vessel for which a mortgage has been filed under this section only if the mortgagee consents.

(e) The Secretary shall -

(1) record the bills of sale, conveyances, mortgages, assignments, and related instruments of a documented vessel

complying with subsection (b) of this section in the order they are filed; and

(2) maintain appropriate indexes, for use by the public, of instruments filed or recorded, or both.

(f) On full and final discharge of the indebtedness under a mortgage recorded under subsection (e)(1) of this section, a mortgagee, on request of the Secretary or mortgagor, shall provide the Secretary with an acknowledged certificate of discharge of the indebtedness in a form prescribed by the Secretary. The Secretary shall record the certificate.

(g) The mortgage or related instrument of a vessel covered by a preferred mortgage under section 31322(d) of this title, that is later filed under this section at the time an application for documentation is filed, is valid under this section from the time the mortgage or instrument representing financing became a preferred mortgage under section 31322(d).

(h) On full and final discharge of the indebtedness under a mortgage deemed to be a preferred mortgage under section 31322(d) of this title, a mortgagee on request of the Secretary, a State, or mortgagor, shall provide the Secretary or the State, as appropriate, with an acknowledged certificate discharge of the indebtedness in a form prescribed by the Secretary or the State, as applicable. If filed with the Secretary, the Secretary shall enter that information in the vessel identification system under chapter 125 of this title.

46 U.S.C. § 31322. Preferred mortgages

(a) A preferred mortgage is a mortgage, whenever made, that -

(1) includes the whole of the vessel;

(2) is filed in substantial compliance with section 31321 of this title; and

(3) (A) covers a documented vessel; or

(B) covers a vessel for which an application for documentation is filed that is in substantial compliance with the requirements of chapter 121 of this title and the regulations prescribed under that chapter.

(b) A preferred mortgage filed or recorded under this chapter may have any rate of interest that the parties to the mortgage agree to.

(c) (1) If a preferred mortgage includes more than one vessel or property that is not a vessel, the mortgage may provide for the separate discharge of each vessel and all property not a vessel by the payment of a part of the mortgage indebtedness.

(2) If a vessel covered by a preferred mortgage that includes more than one vessel or property that is not a vessel is to be sold on the order of a district court in a civil action in rem, and the mortgage does not provide for separate discharge as provided under paragraph (1) of this subsection -

(A) the mortgage constitutes a lien on that vessel in the full amount of the outstanding mortgage indebtedness; and

(B) an allocation of mortgage indebtedness for purposes of separate discharge may not be made among the vessel and other property covered by the mortgage.

(d) (1) A mortgage or instrument granting a security interest perfected under State law covering the whole of a vessel titled in a State is deemed to be a preferred mortgage if -

(A) the Secretary certifies that the State titling system complies with the Secretary's guidelines for a titling system under section 13106(b)(8) of this title; and

(B) information on the vessel covered by the mortgage or instrument is made available to the Secretary under chapter 125 of this title.

(2) This subsection applies to mortgages or instruments covering vessels titled in a State after -

(A) the Secretary's certification under paragraph (1)(A) of this subsection; and

(B) the State begins making information available to the Secretary under chapter 125 of this title.

(3) A preferred mortgage under this subsection continues to be a preferred mortgage if the vessel is no longer titled in the State where the mortgage was made.

(e) If a vessel is already covered by a preferred mortgage when an application for titling or documentation is filed -

(1) the status of the preferred mortgage covering the vessel to be titled in the State is determined by the law of the jurisdiction where the vessel is currently titled or documented; and

(2) the status of the preferred mortgage covering the vessel to be documented under chapter 121 is determined by subsection (a) of this section.

46 U.S.C. § 31325. Preferred mortgage liens and enforcement

(a) A preferred mortgage is a lien on the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by the vessel.

(b) On default of any term of the preferred mortgage, the mortgagee may -

(1) enforce the preferred mortgage lien in a civil action in rem for a documented vessel, a vessel to be documented under chapter 121 of this title, or a foreign vessel;

(2) enforce a claim for the outstanding indebtedness secured by the mortgaged vessel in -

(A) a civil action in personam in admiralty against

the mortgagor, maker, comaker, or guarantor for the amount of the outstanding indebtedness or any deficiency in full payment of that indebtedness; and

(B) a civil action against the mortgagor, maker, comaker, or guarantor for the amount of the outstanding indebtedness or any deficiency in full payment of that indebtedness; and

(3) enforce the preferred mortgage lien or a claim for the outstanding indebtedness secured by the mortgaged vessel, or both, by exercising any other remedy (including an extrajudicial remedy) against a documented vessel, a vessel for which an application for documentation is filed under chapter 121 of this title, a foreign vessel, or a mortgagor, maker, comaker, or guarantor for the amount of the outstanding indebtedness or any deficiency in full payment of that indebtedness, if -

(A) the remedy is allowed under applicable law; and

(B) the exercise of the remedy will not result in a violation of section 9 or 37 of the Shipping Act, 1916 (46 App. U.S.C. 808, 835).

(c) The district courts have original jurisdiction of a civil action brought under subsection (b)(1) or (2) of this section. However, for a documented vessel, a vessel to be documented under chapter 121 of this title, or a foreign vessel, this jurisdiction is exclusive of the courts of the States for a civil action brought under subsection (b)(1) of this section.

(d) (1) Actual notice of a civil action brought under subsection (b)(1) of this section, or to enforce a maritime lien, must be given in the manner directed by the court to -

(A) the master or individual in charge of the vessel;

(B) any person that recorded under section 31343(a) or (d) of this title a notice of a claim of an undischarged lien on the vessel; and

(C) a mortgagee of a mortgage filed or recorded under section 31321 of this title that is an undischarged mortgage on the vessel.

(2) Notice under paragraph (1) of this subsection is not required if, after search satisfactory to the court, the person entitled to the notice has not been found in the United States.

(3) Failure to give notice required by this subsection does not affect the jurisdiction of the court in which the civil action is brought. However, unless notice is not required under paragraph (2) of this subsection, the party required to give notice is liable to the person not notified for damages in the amount of that person's interest in the vessel terminated by the action brought under subsection (b)(1) of this section. A civil action may be brought to recover the amount of the terminated interest. The district courts have original jurisdiction of the action, regardless of the amount in controversy or the citizenship of the parties. If the plaintiff prevails, the court may award costs and attorney fees to the plaintiff.

(e) In a civil action brought under subsection (b)(1) of this section -

(1) the court may appoint a receiver and authorize the receiver to operate the mortgaged vessel and shall retain in rem jurisdiction over the vessel even if the receiver operates the vessel outside the district in which the court is located; and

(2) when directed by the court, a United States marshal may take possession of a mortgaged vessel even if the vessel is in the possession or under the control of a person claiming a possessory common law lien.

(f) (1) Before title to the documented vessel or vessel for which an application for documentation is filed under chapter 121 is transferred by an extrajudicial remedy, the person

exercising the remedy shall give notice of the proposed transfer to the Secretary, to the mortgagee of any mortgage on the vessel filed in substantial compliance with section 31321 of this title before notice of the proposed transfer is given tothe Secretary, and to any person that recorded a notice of a claim of an undischarged lien on the vessel under section 31343(a) or (d) of this title before notice of the proposed transfer is given to the Secretary.

(2) Failure to give notice as required by this subsection shall not affect the transfer of title to a vessel. However, the rights of any holder of a maritime lien or a preferred mortgage on the vessel shall not be affected by a transfer of title by an extrajudicial remedy exercised under this section, regardless of whether notice is required by this subsection or given.

(3) The Secretary shall prescribe regulations establishing the time and manner for providing notice under this subsection.

46 U.S.C. § 31326. Court sales to enforce preferred mortgage liens and maritime liens and priority of claims

(a) When a vessel is sold by order of a district court in a civil action in rem brought to enforce a preferred mortgage lien or a maritime lien, any claim in the vessel existing on the date of sale is terminated, including a possessory common law lien of which a person is deprived under section 31325(e)(2) of this title, and the vessel is sold free of all those claims.

(b) Each of the claims terminated under subsection (a) of this section attaches, in the same amount and in accordance with their priorities to the proceeds of the sale, except that -

(1) the preferred mortgage lien, including a preferred mortgage lien on a foreign vessel whose mortgage has been guaranteed under title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1101 et seq.) [1] has priority over all claims against the vessel (except for expenses and fees allowed by the court, costs imposed by the court, and preferred maritime liens); and

(2) for a foreign vessel whose mortgage has not been guaranteed under title XI of that Act, the preferred mortgage lien is subordinate to a maritime lien for necessaries provided in the United States.

46 U.S.C. § 31342. Establishing maritime liens

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner -

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

46 U.S.C. § 31343. Recording and discharging liens on preferred mortgage vessels

(a) Except as provided under subsection (d) of this section, a person claiming a lien on a vessel covered by a preferred mortgage filed or recorded under this chapter may record with the Secretary of Transportation a notice

of that person's lien claim on the vessel. To be recordable, the notice must -

(1) state the nature of the lien;

(2) state the date the lien was established;
(3) state the amount of the lien;
(4) state the name and address of the person; and
(5) be signed and acknowledged.

(b) The Secretary shall record a notice complying with subsection (a) of this section.

(c) On full and final discharge of the indebtedness that is the basis for a claim recorded under subsection (b) of this section, on request of the Secretary or owner, the person having the claim shall provide the Secretary with an acknowledged certificate of discharge of the indebtedness. The Secretary shall record the certificate.

(d) A person claiming a lien on a vessel covered by a preferred mortgage under section 31322(d) of this title must record and discharge the lien as provided by the law of the State in which the vessel is titled.